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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 8

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*, constituting a Committee of Creditors of Morris White, Inc.,
Respondent (Appellee Below).

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR REVIEW OF ORDER AWARDING THE PAYMENT IN CASH TO PETITIONERS OF ALIQUOT SHARE OF DEFENDANTS ASSETS.

VALERIA E. CORIELL,
MORRIS WHITE, INC.,
IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.

MICHAEL HOLLANDER, *et al.*,
constituting a Committee of
Creditors of Morris White, Inc.
Respondents.

JOSEPH GLASS,
JEROME WEINSTEIN,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondent (Appellee Below).

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Respondents in Opposition to Petition for Review of Order Awarding the Payment in Cash to Petitioners of Aliquot Share of Defendants Assets.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 251-266) is reported in 54 Fed. (2d) 255. The opinion of Judge Knox in the District Court (R. 193-195) is not reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals (order for mandate) was entered November 23, 1931 (R. 267). The petition for writ of certiorari was filed February 23, 1932.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Preliminary Statement.

Two separate petitions are pending herein upon two separate and distinct records. One is a petition to review the order of the Circuit Court of Appeals for the Second Circuit, which affirms an order of the United States District Court for the Southern District of New York, dated June 3, 1931, appointing Irving Trust Company as permanent Receiver in Equity of the defendant, Morris White, Inc. The other is a petition for review of the order of the Circuit Court of Appeals for the Second Circuit which, in substance modifies an order of the said District Court dated June 15, 1931 approving the offer made for the purchase of the assets of the defendant, Morris White, Inc.

The separate petitions present separate and distinct questions of law and fact. The separate questions raised by the separate petitions will be considered separately. Much of the matter contained in the instant petition and brief in support thereof has no bearing upon the issues before this Court upon the instant petition.

A motion is about to be made to dismiss both petitions upon the ground that the petitioners have waived all right of review. The order of the said Circuit Court, dated Novem-

ber 25, 1931, provides (Petition, p. 6) that a special master be appointed to appraise the value of petitioners' claims, ascertain the value of the defendant's assets as if sold at public sale and award petitioners their respective *aliquot* shares of the ascertained sum that would have been realized upon such sale of said assets, and that such amount be paid to petitioners in cash. The petitioners, after the signing of the order of the District Court upon the order for the mandate sought to be reviewed, proceeded with proof before the special master named in that order and participated in all hearings before that Special Master, *without objection*. By so doing, they waived all right to object to either of the orders now sought to be reviewed.

Statement.

On April 6, 1931, Irving Trust Company was appointed as temporary receiver in equity for the defendant Morris White, Inc. The facts leading to the appointment of an equity receiver herein are set forth in detail in pages 3 to 5 of respondents' brief in opposition to petition for review of the order making the receivership permanent. The Court is respectfully referred to said brief. A meeting of creditors was called by the receiver (R. 27, 111) and was held on April 14, 1931. Creditors with claims in the total amount of $717,000 were represented at the hearing (R. 27). A creditors' committee of nine members was elected by unanimous consent of all creditors present (R. 27, 89-91). The members of the committee directly represented claims of approximately $600,000 (R. 27, 112). A representative of the National Surety Company—the leading petitioner—became a member *ex officio* at the suggestion of the committee (R. 112) and participated in all the deliberations of that committee (R. 112, 183). The creditors' committee, after appraising the assets, proceeded to draft a reorganization plan, the terms of which were embodied in an offer made by Lily White dated April 29, 1931 (R. 26-58). On petition of the

receiver, an order was signed, dated May 12, 1931, directing all creditors and any and all other persons interested to show cause at a hearing to be held on the 26th day of May, 1931, why the offer made by Lily White, dated April 29, 1931 "should not be accepted and approved by this Court and **at such time and place to consider and act upon any other offer or offers which may then be made"** (R. 24, 25). The order directs the receiver to mail a copy thereof to all creditors of the defendant and to all parties interested, known to the receiver, on or before May 12, 1931 and **to publish in the New York Times on or before May 15, 1931, a notice stating briefly the provisions of the order** (R. 25). It is stipulated on the record by petitioners **"that the receiver gave due notice of hearing pursuant to the terms of the foregoing order"** (R. 25). Following publication of the notice, several prospective purchasers examined the assets (R. 188). **The only bid made for the defendant's assets was the one approved by the District Court.** The terms of the offer as submitted to the Court were modified pursuant to the direction of the District Judge (R. 227-230). The offer as finally approved by the District Court (R. 226-231), provides for the transfer of all of the defendant's assets, less the amount required to satisfy the obligations of the receiver and the fees and expenses of administration, to a corporation to be organized. This corporation is referred to as the New Corporation (R. 33, 34). The fees and allowances of the receiver and the receiver's counsel and all other allowances payable out of the assets of the estate are expressly made subject to the approval of the Court (R. 228). Creditors are to receive payment of 100% of their allowed claims in the following manner: 20% in notes of the New Corporation and four notes of 5% each, payable at intervals of six months commencing January 1, 1932; and 80% in preferred stock of the New Corporation (R. 43, 44). Such preferred stock is to be issued only and solely to creditors of the defendant (R. 34). In the event of default in the payment of any of the said notes all of such notes at the option of each holder

thereof, become due and payable (R. 44). The holders of preferred stock are entitled to cumulative dividends at the rate of 6% per annum commencing January 1, 1934 (R. 228). No dividends are payable on the common stock until all outstanding shares of preferred stock have been retired (R. 39). One-third of the operating profits of the New Corporation for any fiscal year after July 1, 1933 must be applied to the retirement of preferred stock (R. 39). The manner of computing such profits is fixed (R. 39) and such profits are to be determined by a yearly audit to be made by certified public accountants (R. 39). On dissolution, the par value of the preferred stock and accrued dividends must be paid in full before any distribution is made to holders of common stock (R. 40). The holders of preferred stock are entitled as a class to elect two of the five directors of the New Corporation until the preferred stock has been fully retired (R. 36). Until the notes are paid in full, the board of directors has the sole and exclusive right to employ and fix the salaries of executives of the corporation (R. 37). Such action of the said board of directors must be concurred in by four of the five members of the board of directors (R. 37). It is a condition of the said offer that the New Corporation, before the transfer of the assets of the defendant, obtain the release of the receiver from all claims of the Government of the United States and of the State of New York (R. 43). The New Corporation must file a notice of appearance submitting itself to the summary jurisdiction of the Court for the purpose of enforcing performance of its obligations under the terms of the offer (R. 49).

The plan of reorganization had been unanimously approved by the creditors' committee which directly represented claims of approximately $600,000 (R. 112). Upon the hearing, approval of the plan was expressed by the Government of the United States which had filed a claim for $100,000 (R. 81, 157). The State of New York, with a claim for $57,000, favored the plan (R. 152). The landlord, Vincent Astor, an unsecured creditor in the sum of $17,000 was "convinced it

is to the best interests of the creditors to accept this offer" (R. 104). **Creditors** (R. 92, 93, 141, 154-157, 193) **with claims of $860,000 affirmatively voiced their approval of the plan.**

The Court specifically invited an expression of opinion from the creditors opposing the plan (R. 139). **Of approximately 250 creditors of defendant** (R. 138) **only the petitioners, five in number, opposed the plan.**

The petitioner, Herman Loewenstein, is a merchandise creditor with a claim of $5,600 (R. 102, 103). The petitioner, G. Levor & Co. Inc., is a judgment creditor with a claim of some $4,500 (R. 101). The various surety companies had issued policies of credit insurance to certain creditors of Morris White, Inc., and were subject thereon to a liability not in excess of $92,000 (R. 256) upon which there had been paid approximately $19,000 (R. 256).

On June 15, 1931, the Court entered an order approving the offer made pursuant to the plan of reorganization, subject to the modifications provided in the said order (R. 226-231). In its decree, the Court made the following finding of fact:

> "3. **No offer other than said offer of Lily White dated April 29th, 1931 for the purchase of the assets of the defendant and of the Receiver's right, title and interest therein has been made."**

From that order the petitioners appealed to the Circuit Court of Appeals.

The gist of petitioners' objections in the Circuit Court of Appeals is stated in the opinion of that Court as follows (R. 257):

> "The question presented to us is whether these minority creditors are obliged to accept the plan, taking stock and notes in place of cash, and be contented to wait the outcome of this new venture in the hope that some day the preferred stock will be redeemed and payment of their notes made. Have the appellants been deprived of their rights as creditors by this order?"

The Circuit Court of Appeals held that the order of the District Court, in so far as it deprived objecting creditors of the payment in cash of their pro rata interest in the defendant's assets, was improper, and reversed the order to that extent. It held (R. 264-265):

> "An outstanding circumstance is the willingness of the majority of creditors to proceed with this reorganization, expressing the view, as they did in the court below, that the rehabilitation of White's business gave the best promise for the payment of their debts. They willingly consented to the transfer of all the corporation's assets, deferring the payment of their debts for a sufficiently long time to warrant the expectation of payment of the notes and redemption of the preferred stock. But the minority creditors, appellants, insisting upon the right to share immediately in the proceeds of a forced sale of the corporation's assets, have dissented. Their rights must be protected. They are ordinarily entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder. They have a just claim to their proportionate share of the price which would have been realized at such sale after deduction of administration expenses. If a court of equity can protect these rights and at the same time carry out the wish of the other creditors, who favor the plan of reorganization, it should be done. The reorganization plan has been put into operation, and creditors, excepting the appellants, are content to have it proceed. We think both may be protected."

The Circuit Court of Appeals has directed that the appellants be paid their distributive share of the assets in cash (R. 265-266).

> "The appellants will be fully protected by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale. * * * In this way, from the ascertained sum of money that would have been realized, had a sale taken place, the appellants may be awarded their aliquot

> shares of the assets. This sum must be paid in cash, or, at the option of each of the appellants, the preferred stock and notes offered to them may be valued as of the date the reorganization plan became effective, and that sum paid in cash to them or either of them. * * * If payment is not thus made in cash, the several amounts which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation. * * * There will thus be preserved to appellants their right to payment in cash, and it removes the objection they properly raise. The remaining creditors, satisfied with the plan, are then free to proceed with its operation."

The order of the Circuit sought to be reviewed provides (R. 268):

> "that the order of said District Court be and it hereby is reversed with costs, and cause remanded to the District Court for further proceedings in accordance with the opinion of this court."

Argument.

I. The order of the Circuit Court of Appeals sought to be reviewed relieves objecting creditors from acceptance of the reorganization plan and awards to petitioners the payment in cash of their respective aliquot shares of defendant's assets. The alleged unfairness of the reorganization plan, insofar as petitioners were affected, were eliminated by the order of the Circuit Court. The fairness of the reorganization plan is therefore not before this Court.

II. The procedure decreed by the Circuit Court of Appeals for the determination of the amount to be awarded and paid to petitioners in cash is fair, practical and proper.

I.

The fairness of the plan of reorganization is not in issue. That plan by the decree of the Circuit Court of Appeals sought to be reviewed is binding only upon those creditors who, to quote the Circuit Court, "are satisfied with the plan." The dissenting creditors are not compelled to accept stock or notes. Petitioners, by the order of the Circuit Court of Appeals sought to be reviewed, are to be paid their distributive share of the defendant's assets in cash. They have no greater right, either in an equity receivership or in a bankruptcy proceeding. The assets of an insolvent corporation, whether administered in equity or in bankruptcy, constitute a fund for the benefit of *all* creditors and all creditors are entitled to share *ratably* therein in accordance with their respective claims against the insolvent.

Under the order of the Circuit Court of Appeals the petitioners get precisely what they would have received if the order of the District Court had never been entered, and a sale for cash had been had and are in no way prejudiced. Assuming even that assenting creditors were prejudiced by the order of the District Court and the refusal of the Circuit Court to completely reverse it, their rights are not here on review and that question is academic on this application.

The petitioners contend at page 6 of the petition that the Circuit Court of Appeals erred in holding that the petitioners were limited to an aliquot share in cash of the sum ascertained by the Special Master to be the realizable value of the property of Morris White, Inc. at a public sale as of June 15, 1931, or at their option, an aliquot share in cash equivalent to the value of the preferred stock and notes offered under the reorganization plan. Not one of the authorities cited at page 7 of the petition supports this contention. There are no other authorities cited, either in the petition or in the brief, in support of that contention. *None can be cited.*

Neither upon principle nor upon authority can petitioners make any meritorious claim to more than that which has been awarded to them by the decree of the Circuit Court of Appeals which petitioners seek to review.

II.

The Circuit Court of Appeals has decreed that the petitioners be paid in cash their aliquot share of the defendant's assets. It must be presumed, since there is no indication to the contrary, that a fair and proper method of proof will be followed in ascertaining the amount to be paid in cash to the petitioners for their protection. Pending the determination of the Special Master, the Circuit Court of Appeals has imposed a lien upon the assets transferred to the new corporation and has provided that, in the event payment is not made, these assets be sold (R. 265) to satisfy petitioners' claims.

In the event that the rules of proof adopted by the Special Master are improper, petitioners' remedy is by an appeal from the order entered on the Special Master's report. The question as to whether or not a fair and proper determination has been made of the respective amounts to be paid to the petitioners in cash must, and can only be, raised after a determination by the Special Master.

There is nothing inherent in the procedure decreed by the Circuit Court of Appeals which prevents a fair determination of the respective amounts to be awarded to petitioners as their aliquot shares of the defendant's assets, nor does such procedure impose any undue burden upon petitioners. Petitioners are required to prove their claims before the Special Master. This they would be required to do in any event. The Special Master is directed to ascertain the amount of liabilities of the defendant. This presents no difficulties and must be done in any event. A determination of the expenses of administration by the Special Master, likewise, fails to present any problem. The only question raised by petitioners is the ability of the Special Master to ascertain "the value of

the assets as if sold at a public sale" (R. 265). This presents a simple question of fact, which is not unique or extraordinary. Similar questions are presented in the every day business of the court. Upon an application to vacate a sale in bankruptcy upon the ground of inadequacy of consideration the Court is called upon to determine the value of the assets at the date of sale. Under statutory provisions, which exist in practically every State, stockholders who oppose a sale of the assets of the corporation may, subsequent to the date of sale, obtain an appraisal of the value of their interest in the assets of the corporation at the date of the sale, and claim that amount in cash. Similar statutory provisions afford similar rights to stockholders who object to corporate consolidations and mergers. Indeed, in the ordinary case for breach of contract of sale, the Court often determines the market value of the goods at a date several years antecedent to its determination. Hence, a determination by the Special Master of the amount which would have been realized upon a public sale of the assets on June 15, 1931 presents no unique or extraordinary problem. In the event that there are deficiencies of proof, the Special Master will apply the appropriate rules of presumption. If he fails to do so, petitioners' remedy is by way of an appeal from the order to be entered on his report. Petitioners have no right to anticipate error by the Special Master.

Whether or not any bids whatsoever would be received, in the event that a new sale of the assets were decreed, is highly speculative. **In accordance with the order of the District Court, the Receiver published notice in the New York Times that a hearing would be held to consider all offers for the purchase of the defendant's assets** (R. 226). **Several prospective purchasers made inquiries, but upon the hearing there were no bids, and the District Court found as a fact** (R. 226)

> "3. **No offer other than said offer of Lily White dated April 29th, 1931 for the purchase of the assets of the defendant and of the Receiver's right, title and interest therein has been made.**"

The petitioners had notice of this hearing and appeared thereon and made no bid. The absence of bidders may be explained by the fact that the assets were subject to a lien of the United States Government for unpaid taxes, for which a claim of approximately $100,000 has been filed.

The questions which petitioners urge as of public importance and novel are not involved on this application. While such questions might have been involved before the Circuit Court, the decision of that court gave to petitioners the rights which they claim were denied them by the order of the District Court. Any original error of the District Court is therefore now purely academic insofar as petitioners are concerned, and only abstract isues are therefore sought to be presented by this application. While such abstract issues may be novel and their determination of public interest, they are not before this Court on this petition.

The instant case is not one which is entitled to the consideration of this Court under the rules governing the issuance of writs of certiorari.

Respectfully submitted,

VALERIA E. CORIELL,
MORRIS WHITE, INC.,
IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.

MICHAEL HOLLANDER, *et al.*,
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APRIL, 1932.